BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the United States Board of Tax Appeals (now the Tax Court of the United States) was filed June 9, 1942 and is reported in 47 B.T.A. 62 (R. 11-19).

The opinion of the Circuit Court of Appeals was filed November 3, 1943 and is reported in 138 F. (2d) 553.

The Facts.

The facts are sufficiently stated in the petition, p. 2.

ARGUMENT.

The Revenue Act of 1926 is not to be construed as applicable to insurance policies issued prior to the effective date of the Revenue Act of 1918.

The two policies involved herein were issued respectively on October 30, 1911 and March 1, 1917. The Revenue Act of 1918, which was the first of the revenue acts expressly to require the inclusion of life insurance proceeds in the gross estate, became effective on February 24, 1919. Prior to such effective date the insured had designated named persons as beneficiary under each policy. Under one policy he had no right to change the beneficiary so designated; under the other, he had such right but did not exercise it subsequent to the effective date of the 1918 Act.

Lewellyn v. *Frick*, 268 U. S. 238, arose under the Revenue Act of 1918 and involved several life insurance policies issued prior to the effective date of the Act. The Court, speaking through Mr. Justice Holmes, held that the proceeds of the policies were not includible in the gross estate, since to construe the insurance section of the Act as retroactive would raise grave doubts as to its constitutionality, which doubts are to be avoided by construing the statute as referring only

to transactions taking place after it was passed. Certain of the policies involved in the *Frick* case provided for a change of beneficiary at the option of the insured, and the opinion of the Court was intended by it to apply to these policies as well as to other policies involved in the case wherein the decedent retained no incidents of ownership. This is brought out by the opinion of the Court in *Bingham* v. *United States*, 296 U. S. 211, wherein the Court has occasion to allude to its opinion in the *Frick* case.

The *Bingham* case arose under the Revenue Act of 1918 and involved certain policies issued prior to 1918 wherein the decedent retained a "possibility of reverter" that is, the proceeds were payable to a named beneficiary if living, otherwise to the insured's estate. The District Court (7 F. Supp. 907), relying on the *Frick* case, held that the policies could not be taxed whether or not the decedent retained legal incidents of ownership. The Circuit Court of Appeals for the First Circuit (76 F. (2d) 573) reversed the judgment of the District Court on the ground that the provisions of the policies in the *Frick* case for a change of beneficiary were not referred to by this Court in its opinion. This Court reversed, holding that the distinction sought to be drawn by the Circuit Court of Appeals between the *Bingham* case and the *Frick* case was untenable, that all of the provisions of all the policies involved in the *Frick* case were before the Court and that its decision in that case must be deemed to have applied to all of the policies in that case.

On this ground the decision of the Court was unanimous. As an alternative ground, the majority of the Court held that under the authority of *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, no taxable transfer arose out of the termination at death of the insured's possibility of reverter. It is to be noted, however, that Justices Brandeis, Stone and Cardozo,

who had dissented in the *St. Louis Union Trust Co.* cases, concurred specially in the *Bingham* case by joining only in the first ground of the opinion, namely that the *Frick* case was controlling. Chief Justice Hughes, who had likewise dissented in the *St. Louis Union Trust Co.* cases, concurred in the second ground of the *Bingham* opinion only because he felt bound to follow the precedent of the former decisions. It is true that *Helvering* v. *Hallock*, 309 U. S. 106, overruled the *St. Louis Union Trust Co.* cases and thus in substance may have overruled the holding of the *Bingham* case that the retention of a possibility of reverter under an insurance policy is not an incident of ownership. The *Hallock* case does not, however, purport to overrule the first ground of the *Bingham* decision.

The significance of the special concurrence by the minority in the *Bingham* case is to make it clear that these four Justices were of the opinion that there were two separate and distinct grounds for the decision in the *Bingham* case, and that while they were of the opinion that the retention of a possibility of reverter would ordinarily constitute a sufficient basis for the imposition of the tax, yet they were of the opinion that the tax should not be imposed where the retroactivity feature was present. The view of these four Justices as to the effect of a possibility of reverter in a case not involving retroactivity is now, under the *Hallock* case, the view of the majority of this Court. It is submitted that this Court should recognize that there were two separate grounds of the *Bingham* decision and that the first ground, involving the issue of retroactivity, has never been overruled.

In *Industrial Trust Co.* v. *United States*, 296 U. S. 220, decided on the same day as the *Bingham* case, the policies antedated the passage of the 1918 Act, but the insured died subsequent to the passage of the Revenue Act of 1926. The government contended that section 302 (h) of the 1926 Act

made the insurance section of the law expressly retroactive. This Court held it debatable whether section 302 (h) would have this effect, and that in any event if it did the provision was open to grave doubts as to its constitutionality and the rule of the *Frick* case controlled.

The Circuit Court of Appeals in the present case held that in view of the decisions of this Court in the *Hallock* case and in *United States* v. *Jacobs*, 302 U. S. 363, the *Bingham* and *Industrial Trust Co.* cases were no longer controlling. It is submitted that this conclusion overlooks entirely the real point of the *Frick*, *Bingham* and *Industrial Trust Co.* cases. That point is that, as a matter of statutory construction, based upon the long-settled principle that statutes are to be construed in such a way as to avoid doubts as to their constitutionality, the taxing statute should not be construed as applicable to policies taken out before the 1918 Act. This principle of construction has been followed by this Court on many occasions, for example, in *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375; *Blodget* v. *Holden*, 275 U. S. 142; *Crowell* v. *Benson*, 285 U. S. 22; *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1; and *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337. This Court did not purport to overrule this principle in the *Hallock* case. The real question involved in that case was whether there was any distinction for tax purposes between a possibility of reverter and a contingent remainder, and the conclusion of this Court was that there was no distinction. The principle of statutory construction to which we have referred was in no way involved in that case. Nor did that case purport to overrule the principle of *stare decisis*. The *St. Louis Union Trust Co.* cases were overruled on the basis that adherence to those cases was unwarranted "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience".

Clearly adherence to the decisions in the *Frick, Bingham* and *Industrial Trust Co.* cases would not involve collision with any prior doctrine, but on the contrary the rule of statutory construction which the Court followed in those three cases was one of long standing.

The *Jacobs* case, relied on by the Circuit Court of Appeals, likewise did not purport to overrule the principle of statutory construction applied by this Court in the *Frick, Bingham* and *Industrial Trust Co.* cases. In the Jacobs case the question at issue was one of the constitutionality of the taxing statute as applied to joint estates created prior to the first enactment of the statute, and the decision of the Court was that the tax could constitutionally be applied. The Court did not, however, purport to overrule its earlier decisions that as a matter of construction the statute did not apply retroactively to insurance policies. The fact that this Court has held one kind of property to be taxable in the *Jacobs* case does not warrant the holding that earlier decisions, construing the statute as not applicable to an entirely different kind of property, have been overruled.

Conclusion.

The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the *Frick, Bingham* and *Industrial Trust Co.* cases. It is in conflict with a doctrine of statutory construction followed by this Court in a long series of cases. For these reasons we submit that the petition for certiorari should be granted.

Respectfully submitted,

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